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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/000,262	11/28/2001	Edward Anthony Bezdek	CFLAY.00075	9131
22858	7590	09/29/2004		EXAMINER
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DALLAS, TX 75380			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 09/29/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/000,262	BEZEK ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Drew E Becker	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 30 August 2004.
- 2a) This action is FINAL.                            2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1,2 and 4-31 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-2, 4-31 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) All
  - b) Some \*
  - c) None of:
    1. Certified copies of the priority documents have been received.
    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) Notice of Informal Patent Application (PTO-152)
- 6) Other: \_\_\_\_\_.

## DETAILED ACTION

### ***Claim Rejections - 35 USC § 112***

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claim 29 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
3. Claim 29 recites "fits both large and small hands comfortably". It is not clear what size hand would be considered "large" and "small".

### ***Claim Rejections - 35 USC § 102***

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

5. Claims 27-29 are rejected under 35 U.S.C. 102(e) as being anticipated by Miller [Pat. No. 6,474,494].

Miller teaches a portable container comprising a cylindrical receptacle for holding a first food product in the form of a beverage (Figure 1, #18), a removable cap over a first end of the receptacle which acts as a bowl (Figure 1, #14), a removable seal (Figure 1, #12), the cap containing promotional products such as chips and dip (column 4, line 44), the receptacle containing a beverage (column 4, line 18), the receptacle having a hand grip (Figure 1), and a collar (Figure 1, #14BB). The recitation "for holding a solid food product..." has not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951).

6. Claims 27-29 are rejected under 35 U.S.C. 102(e) as being anticipated by Lee et al [Pat. No. 6,068,865].

Lee et al teach a portable container comprising a cylindrical receptacle for holding a first food product (Figure 1, #30), a removable cap over a first end of the receptacle which was capable of acting as a bowl when inverted (Figure 1, #20), a removable seal (Figure 1, #32), the cap containing promotional products such as chocolate (Figure 2, #24), the receptacle containing yoghurt (Figure 2, #34), the receptacle having a shape that provided a hand grip (Figure 1, #30), the cap having a collar or rim (Figure 1, #20), and the cap being transparent (column 6, line 30). The recitation "for holding a solid

“food product...” has not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951).

7. Claims 27-30 are rejected under 35 U.S.C. 102(b) as being anticipated by Le Rose [Pat. No. 2,076,132].

Le Rose teaches a portable container comprising a generally cylindrical receptacle for holding a first food product in the form of a beverage (Figure 1, #7), a removable cap over a first end of the receptacle which was capable of acting as a bowl when inverted (Figure 1, #15), a removable seal (Figure 2, #13), the cap containing promotional products such as ice cream (column 2, line 16), the receptacle containing soda (column 1, line 7), the receptacle having a shape that provided a hand grip (Figure 1, #9), the cap having a collar (Figure 1, #19), and the cap having a lip which engaged a groove in the receptacle (column 2, line 25). The recitation “for holding a solid food product...” has not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190

USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951).

8. Claims 27-30 are rejected under 35 U.S.C. 102(e) as being anticipated by Nava et al [Pat. No. 6,070,752].

Nava et al teach a portable container comprising a generally cylindrical receptacle for holding a first food product in the form of a beverage (Figure 1, #8), a removable cap over a first end of the receptacle which was capable of acting as a bowl when inverted (Figure 1, #10), the cap containing promotional products such as CD's (Figure 2, #16), the receptacle containing soda (Figure 1, #9), the receptacle having a shape that provided a hand grip (Figure 1, #8), and the cap having a collar or rim (Figure 1, #23). The recitation "for holding a solid food product..." has not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951).

9. Claims 1-2, 4, 8-12, 14-16, 20-24, and 27-30 are rejected under 35 U.S.C. 102(b) as being anticipated by Atkinson [Pat. No. 5,705,212].

Atkinson teaches a container comprising a food product (Figure 1, #16), a collectible spoon (Figure 1, #22), a cylindrical receptacle including a handgrip region (Figure 1, #12), a removable cap capable of acting as a cup or bowl (Figure 1, #14), a removable

seal (Figure 1, #21), a lip and groove providing a snap-fit (Figure 1, #20), and a collar (Figure 1, #14b).

***Claim Rejections - 35 USC § 103***

10. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

11. Claims 5-7 and 17-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Atkinson as applied above, in view of Kirshenbaum et al [Pat. No. 4,051,265].  
Atkinson teaches the above mentioned components. Atkinson does not teach an outer layer which carries graphics and provides an oxygen barrier. Kirshenbaum et al teach a container and cap with an outer layer which provided an oxygen barrier (Figure 1, #14; abstract), as well as the use of graphics (column 5, lines 50-62). It would have been obvious to one of ordinary skill in the art to incorporate the outer layer of Kirshenbaum et al into the invention of Atkinson since both are directed to food containers, since Atkinson already included a sealed container (Figure 1, #12 & 21), and since the outer layer of Kirshenbaum et al provided an effective oxygen barrier and thus better preserved the food (abstract). It would have been obvious to one of ordinary skill in the art to include graphics on the outer layer of Kirshenbaum et al since Kirshenbaum et al already included graphics on the container itself (column 5, lines 50-62), since outer

layers commonly included graphics, and since graphics on the outer layer would have made the product more distinctive looking and set it apart from its competitors.

12. Claims 13 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Atkinson as applied above, in view of Lee et al.

Atkinson teaches the above mentioned components. Atkinson does not recite a transparent region. Lee et al teach a container comprising a transparent region (column 6, line 30). It would have been obvious to one of ordinary skill in the art to incorporate the transparent region of Lee et al into the invention of Atkinson since both are directed to food containers, since Atkinson already included cap with an interior chamber for the spoon (Figure 1, #14), and since the transparent cap of Lee et al would have better displayed the novel spoon of Atkinson, and thus increased consumer appeal.

13. Claim 26 is rejected under 35 U.S.C. 103(a) as being unpatentable over Atkinson as applied above, in view of Howes [Pat. No. 5,076,433].

Atkinson teaches the above mentioned components. Atkinson does not recite a promotional item attached to a second end of the receptacle. Howes teaches a container comprising a promotional item attached to a second end of the receptacle (Figure 1, #21). It would have been obvious to one of ordinary skill in the art to incorporate the bottom attached promotional item of Howes into the invention of Atkinson since both are directed to beverage containers, since Atkinson already included an additional product attached to the first end (Figure 1, #22), since consumers greatly valued promotional items such as prizes, and since the bottom promotional item

of Howes has the advantage of providing a prize, while being completely indistinguishable from a non-prize bearing container (column 2, lines 39-48).

14. Claim 31 is rejected under 35 U.S.C. 103(a) as being unpatentable over Atkinson as applied above, in view of McDevitt et al [Pat. No. 5,204,130].

Atkinson teaches the above mentioned components. Atkinson does not recite polypropylene. McDevitt et al teach a snap-fit food container made from polypropylene (column 2, line 26). It would have been obvious to one of ordinary skill in the art to incorporate the polypropylene of McDevitt et al into the invention of Atkinson since both are directed to food containers, since Atkinson already teach the use of plastics (column 2, lines 33-40), and since polypropylene was commonly used in food containers as shown by McDevitt et al (column 2, line 26).

### ***Response to Arguments***

15. Applicant's arguments filed August 30, 2004 have been fully considered but they are not persuasive.

Regarding the 112(2) rejection, applicant asks for suggested claim language. A definite manner of defining the size of the product would be to state the factual dimensions, for instance inches, centimeters, etc...

Regarding the terms "promotional items" and "collectibles". These terms are not specifically defined by the specification and therefore are given their broadest reasonable interpretation.

Applicant argues that the spoon of Atkinson cannot be considered “collectible”. However, nearly any product can be “collected” and in fact, the spoon is “collected” when the product of Atkinson is purchased. Furthermore, the folding spoon of Atkinson has a degree of novelty which a consumer might covet and want to retain for further use. This would certainly fall within the scope of a “promotional item”.

Regarding claims 8 and 20, applicant argues that Atkinson does not teach a cap which is “seatable” for use as a bowl. However, although Atkinson does not specifically state this property, the cap is certainly capable of use in this manner as shown by the dimensions illustrated in Figures 1-2.

Regarding claim 28, applicant argues that Atkinson does not teach a “curved, generally cylindrical shape”. However, the product of Atkinson certainly was cylindrical with a curved, or circular cross-section (Figures 1-2).

The recitation “for holding a solid food product...” has not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951).

Applicant argues that Nava et al do not teach a cap which holds a promotional item. However, Figure 1, #10 clearly illustrates a cap containing a CD.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

### ***Conclusion***

16. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any

extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Drew E Becker whose telephone number is 571-272-1396. The examiner can normally be reached on Mon.-Thur. 8am-5pm and every other Fri. 8am-4pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Drew E Becker  
Primary Examiner  
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